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104TH CONGRESS }
1st Session }

SENATE

{ REPORT
104-77

FEDERAL POWER ACT AMENDMENTS OF 1995

APRIL 27 (legislative day, APRIL 24), 1995.—Ordered to be printed

Mr. MURKOWSKI, from the Committee on Energy and Natural Resources, submitted the following

REPORT

[To accompany S. 737]

The Committee on Energy and Natural Resources having considered the same, reports favorably thereon an original bill (S. 737) to extend the deadlines applicable to certain hydroelectric projects, and for other purposes, and recommends that the bill do pass.

The text of the bill is as follows:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Federal Power Act Amendments of 1995”.

SEC. 2. EXTENSION OF COMMENCEMENT OF CONSTRUCTION DEADLINE FOR CERTAIN HYDROELECTRIC PROJECTS LOCATED IN THE STATE OF WEST VIRGINIA.

(a) IN GENERAL.—Notwithstanding the time period specified in section 13 of the Federal Power Act (16 U.S.C. 806) that would otherwise apply to the Federal Energy Regulatory Commission projects numbered 6901 and 6902, the Commission shall, upon the request of the licensee for those projects, in accordance with the good faith, due diligence, and public interest requirements of that section, the Commission’s procedures under that section, and the procedures specified in that section, extend the time period during which the licensee is required to commence construction of those projects so as to terminate on October 3, 1999.

(b) APPLICABILITY.—Subsection (a) shall take effect for the projects upon the expiration of the extension, issued by the Commission under section 13 of the Federal Power Act

(16 U.S.C. 806), of the period required for commencement of construction of the projects.

(c) **REINSTATEMENT OF EXPIRED LICENSE.**—If a license for a project described in subsection (a) has expired prior to the date of enactment of this Act, the Commission shall reinstate the license effective as of the date of its expiration and extend the time required for commencement of construction of the project until October 3, 1999.

SEC. 3. EXTENSION OF COMMENCEMENT OF CONSTRUCTION DEADLINE FOR A HYDROELECTRIC PROJECT LOCATED IN THE STATE OF KENTUCKY.

(a) **IN GENERAL.**—Notwithstanding the time period specified in section 13 of the Federal Power Act (16 U.S.C. 806) that would otherwise apply to the Federal Energy Regulatory Commission project numbered 10228, the Commission may, at the request of the licensee for the project and after reasonable notice, in accordance with the good faith, due diligence, and public interest requirements of that section and the Commission's procedures under that section, extend the time period during which the licensee is required to commence the construction of the project, under the extension described in subsection (b), for not more than 3 consecutive 2-year periods.

(b) **EFFECTIVE DATE.**—This section shall take effect on the date of the expiration of the extension of the period required for commencement of construction of the project described in subsection (a) that the Commission issued, prior to the date of enactment of this Act, under section 13 of the Federal Power Act (16 U.S.C. 806).

SEC. 4. EXTENSION OF COMMENCEMENT OF CONSTRUCTION DEADLINE FOR A HYDROELECTRIC PROJECT LOCATED IN THE STATE OF WASHINGTON.

Notwithstanding the time limitation of section 13 of the Federal Power Act, the Federal Energy Regulatory Commission, upon the request of the licensee for FERC Project No. 3701, is authorized, in accordance with the good faith, due diligence, and public interest requirements of section 13 and the Commission's procedures under such section, to extend until May 31, 2001, the time required for the licensee to commence the construction of such project. This section shall take effect for the project upon the expiration of the extension (issued by the Commission under section 13) of the period required for commencement of construction of such project. If the license for FERC Project 3701 should expire prior to the date of enactment of this Act, the Commission is authorized and directed to reinstate effective June 1, 1995, the license previously issued for such project, to extend until May 31, 2001, the time required for the licensee to commence the construction of such project.

SEC. 5. EXTENSION OF COMMENCEMENT OF CONSTRUCTION DEADLINE FOR A HYDROELECTRIC PROJECT LOCATED IN THE STATE OF OREGON.

Notwithstanding the expiration of the permit and notwithstanding the time period specified in section 13 of the

Federal Power Act (16 U.S.C. 806) that would otherwise apply to the Federal Energy Regulatory Commission project numbered 7829, the Commission shall, at the request of the licensee for the project, reinstate the permit effective May 23, 1993, and extend the time period during which the licensee is required to commence the construction of the project to the date that is 4 years after the date of enactment of this Act.

SEC. 6. EXTENSION OF COMMENCEMENT OF CONSTRUCTION DEADLINE FOR CERTAIN HYDROELECTRIC PROJECTS LOCATED IN THE STATE OF ARKANSAS.

Notwithstanding the time limitations of section 13 of the Federal Power Act (16 U.S.C. 806), the Federal Energy Regulatory Commission, upon the request of the licensee for FERC projects numbered 4204, 4660, and 4659 (and after reasonable notice), is authorized, in accordance with the good faith, due diligence, and public interest requirements of section 13 and the Commission's procedures under such section, to extend the time required for commencement of construction of the projects for a maximum of three consecutive two-year periods. This section shall take effect for the project upon the expiration of the extension (issued by the Commission under section 13) of the period required for commencement of such project.

SEC. 7. LIMITED EXEMPTION TO HYDROELECTRIC LICENSING PROVISIONS FOR TRANSMISSION FACILITIES ASSOCIATED WITH THE EL VADO HYDROELECTRIC PROJECT.

(a) EXEMPTION.—Part I of the Federal Power Act, and the jurisdiction of the Federal Energy Regulatory Commission under such part I, shall not apply to the transmission line facilities associated with the El Vado Hydroelectric Project (FERC Project No. 5226-002) which are described in subsection (b).

(b) FACILITIES COVERED BY EXEMPTION.—The facilities to which the exemption under subsection (a) applies are those transmission facilities located near the Rio Chama, a tributary of the Rio Grande, in Rio Arriba County, New Mexico, referred to as the El Vado transmission line, a three phase 12-mile long 69 kV power line installed within a 50-foot wide right-of-way in Rio Arriba County, New Mexico, originating at the El Vado Project's switchyard and connecting to the Spills 69 kV Switching Station operated by the Northern Arriba Electric Cooperative, Inc.

SEC. 8. ALASKA STATE JURISDICTION OVER SMALL HYDROELECTRIC PROJECTS.

The Federal Power Act, as amended, (16 U.S.C. 1791a et seq.) is further amended by adding the following at the end of section 23:

“(c) In the case of any project works in the State of Alaska—

“(1) that are not part of a project licensed under this Act prior to the date of enactment of this subsection;

“(2) for which a license application has not been accepted for filing by the Commission prior to the date of enactment of this subsection (unless such application is withdrawn at the election of the applicant);

“(3) having a power production capacity of 5,000 kilowatts or less;

“(4) located entirely within the boundaries of the State of Alaska; and

“(5) not located in whole or in part on any Indian reservation, unit of the National Park System, component of the Wild and Scenic Rivers System or segment of a river designated for study for potential addition to such system,

“the State of Alaska shall have the exclusive authority to authorize such project works under State law, in lieu of licensing by the Commission under the otherwise applicable provisions of this part, effective upon the date on which the Governor of the State of Alaska notifies the Secretary of Energy that the State has in place a process for regulating such projects which gives appropriate consideration to the improvement or development of the State’s waterways for the use or benefit of intrastate, interstate, or foreign commerce, for the improvement and use of waterpower development, for the adequate protection, mitigation of damage to, and enhancement of fish and wildlife (including related spawning grounds), and for other beneficial public uses, including irrigation, flood control, water supply, recreational and other purposes, and Indian rights, if applicable.

“(d) In the case of a project that would be subject to authorization by the State under subsection (c) but for the fact that the project has been licensed by the Commission prior to the enactment of subsection (c), the licensee of such project may in its discretion elect to make the project subject to the authorizing authority of the State.

“(e) With respect to projects located in whole or in part on Federal lands, State authorizations for project works pursuant to subsection (c) of this section shall be subject to the approval of the Secretary having jurisdiction with respect to such lands and subject to such terms and conditions as the Secretary may prescribe.

“(f) Nothing in subsection (c) shall preempt the application of Federal environment, natural, or cultural resources protection laws according to their terms.”.

SEC. 9. FERC VOLUNTARY LICENSING OF HYDROELECTRIC PROJECTS ON FRESH WATERS IN THE STATE OF HAWAII.

Section 4(e) of the Federal Power Act is amended by striking “several States, or upon” and inserting “several States (except fresh waters in the State of Hawaii, unless a license would be required by section 23 of the Act), or upon”.

PURPOSE OF THE MEASURE

The purposes of S. 737 are: (1) to extend the deadlines contained in the Federal Power Act for the commencement of construction of FERC-licensed hydroelectric projects located in the States of West Virginia, Kentucky, Washington, Oregon and Arkansas; (2) to provide a limited exemption to the hydroelectric licensing provisions of the Federal Power Act for transmission facilities associated with the El Vado hydroelectric project located in New Mexico; (3) to provide the State of Alaska with jurisdiction over small hydroelectric projects of 5 megawatts or less; and (4) to amend the Federal Power Act to remove the jurisdiction of the FERC to issue a voluntarily-requested license for hydroelectric projects located on fresh waters in the State of Hawaii.

BACKGROUND AND NEED

SECTIONS 2 THROUGH 6

Section 13 of the Federal Power Act requires a licensee to commence the construction of a hydroelectric project within two years of the date of the issuance of the license. That deadline can be extended by the FERC one time for as much as two additional years. If construction has not commenced at the end of the time period, the license is terminated by the FERC. Thus, in the absence of this legislation, the FERC would terminate the license at the end of the time period authorized under the Federal Power Act for commencement of construction.

Sections 2 through 6 provide an extension of the time to begin construction for identified hydroelectric projects in the States of West Virginia, Kentucky, Washington, Oregon and Arkansas.

SECTION 7

This section would amend the hydroelectric licensing provisions of Part I of the Federal Power Act to permit a limited exemption for a 12-mile transmission line in Rio Arriba County, New Mexico.

In 1985, the FERC granted the County of Los Alamos, New Mexico (Los Alamos) a major license under the FPA. The license authorized the construction, operation and maintenance of the El Vado Hydroelectric Power Project (El Vado Project) on the Rio Chama in Rio Arriba County, New Mexico. The principal project features include a 175-foot-high, 1,325-foot-long gravel fill dam; a 3,310-acre reservoir; outlet works; a powerhouse with one 8-megawatt generating unit; and a 12-mile-long transmission line.

The transmission line is a three phase 12-mile-long, 69-kilovolt (KV) power line supported on single wooden pole structures located in a 50-foot-wide right-of-way. The line begins at the El Vado Project's switchyard and connects to a 69-KV switching station that is owned and operated by the Northern Rio Arriba Electric Cooperative, Inc. (NORA). NORA is a Rural Electric Administration (REA) financed rural electric cooperative whose distribution system serves the rural area in which the El Vado Project is located.

During the construction phase of the project, it was determined that the project would be better served if NORA would own and operate the transmission line. In 1984, NORA entered into a two-part

agreement with Los Alamos. Los Alamos would contribute the capital for construction of the transmission line and appurtenant facilities. NORA would utilize its system as expanded by the transmission line to assist in the delivery of the project's power output to Los Alamos and provide station services to the project during periods of nongeneration.

Through subsequent audits of the project, the FERC's Office of Hydropower Licensing (OHL) discovered NORA's ownership of the transmission line. In May of 1993, OHL ordered Los Alamos to modify the transmission line ownership structure to be consistent with its license. At the time the transmission line agreement was executed until the OHL order, Los Alamos did not know that allowing NORA to own and operate the transmission line was inconsistent with the provisions of its FERC license.

Section 7 would exempt from the licensing provisions of the FPA only the 12-mile, 69-KV transmission line of the El Vado Project. NORA would continue to own and operate the transmission line; however, it would be made consistent with the project's license. The Committee notes that the United States would not forfeit its FPA jurisdiction over the entire El Vado Project. The exemption applies only to FERC regulatory oversight of the project's transmission line.

The United States would retain a certain amount of control over the transmission line. The line would remain subject to a contract (Contract No. 7-LM-53-01197, dated October 9, 1987) with the Bureau of Reclamation for construction, operation and maintenance of the power line. Also, as the property of NORA, the transmission line would be pledged against NORA's REA loan.

SECTION 8

This section gives the State of Alaska the exclusive authority to authorize hydroelectric projects 5 megawatts or smaller. It goes into effect when the Governor of the State of Alaska notifies the Secretary of Energy that the State has in place a comprehensive process for regulating hydroelectric projects. The required process is modeled on the one contained in the Federal Power Act for the FERC.

The authority granted by this section would apply to projects 5 megawatts or smaller located in the State of Alaska: (1) which are not part of a project licensed under this act prior to the date of enactment; (2) for which an application has not been accepted for filing by the Commission prior to the date of enactment of this subsection (unless such application is withdrawn at the election of the applicant); (3) which are located entirely within the boundaries of the State of Alaska; and (4) which are not located in whole or in part on any Indian reservation, unit of the National Park System, component of the Wild and Scenic Rivers System or segment of a river designated for study for potential addition to such system.

In the case of a project that would be subject to authorization by the State but for the fact that the project has been licensed by the Commission prior to the enactment of subsection, the licensee of such project may in its discretion elect to make the project subject to the authorizing authority of the State.

For hydroelectric projects located on Federal lands, a State authorization for the hydroelectric project is subject to the approval of the Secretary of the Federal agency having jurisdiction with respect to such lands, and is subject to such terms and conditions as that Secretary may prescribe.

The provisions specifically provide that nothing preempts the application of Federal environmental, natural, or cultural resources protection laws according to their terms.

SECTION 9

This section removes the authority of the Federal Energy Regulatory Commission to issue a voluntarily-requested license for hydroelectric projects located on fresh waters of the State of Hawaii.

Section 4(e) of the Federal Power Act contains the Federal Energy Regulatory Commission's basic authority to issue a license for hydroelectric projects. Section 23(b) of the Federal Power Act requires the licensing of a hydroelectric project built after 1935 on navigable waters or affecting interstate commerce.

Section 4(e) has been interpreted by the courts as permitting the voluntary licensing of a hydroelectric project where licensing is not required by section 23(b). (*Cooley v. Federal Energy Regulatory Commission*, 843 F.2d 1464 (D.C. Cir. 1988))

Section 9 would amend the Federal Power Act to remove the jurisdiction of the Federal Energy Regulatory Commission to issue a voluntarily requested license for hydroelectric projects on fresh waters in the State of Hawaii. The policy justification for exempting Hawaii from the voluntary licensing provisions of the Federal Power Act is based on the uniqueness of Hawaii's situation.

The Hawaiian islands are over 2,000 miles from the nearest land mass. They are the most geographically isolated group of islands in the world.

Unlike the long interstate rivers of the continental United States, Hawaii's streams are isolated on individual islands and run quickly off steep volcanic slopes. Hawaii has a total of 376 streams that flow year-round in at least part of their course. These streams are located on five islands—Hawaii (132), Maui (90), Kauai (61), Oahu (57), and Molokai (36). Only twenty-eight are longer than ten miles and only seven have an average flow greater than 80 cubic feet per second. Hawaii's streams are generally not navigable except for a few which have brief wide stretches near their mouths as they open to the sea. There are no interstate rivers, few if any streams crossing Federal lands, and no Federal dams.

Over one-half of Hawaii's streams have been diverted for a variety of uses. Irrigating taro fields was the chief historic use of Hawaii's surface water. During the past century, irrigation of sugarcane and a booming tourist industry have become major water users.

The populations and distribution of native Hawaiian aquatic species are in decline due to stream modification and the introduction of non-native competitors and predators. Although Hawaiian streams contain a small number of native fish, insect, crustacean, and mollusk species, most are only found in Hawaii. The middle and lower sections of Hawaii's streams contain eight diadromous fauna (animals that migrate between fresh and salt water) and two

euryhaline fishes (animals that exist in waters with varying levels of salt). All require access to the ocean. There are no native freshwater species.

The islands of Hawaii contain one-third of all listed threatened and endangered species. Eighteen species of threatened and endangered birds live in the riparian zone of 119 of Hawaii's 376 streams. Four of the species are waterbirds, and the rest are forest birds whose habitat includes streams. Although none of the currently listed threatened and endangered plants are associated with Hawaiian streams, about 180 taxa of rare plants are associated with 86 of those streams.

Eighteen Hawaiian streams are listed on the nationwide inventory of potential wild, scenic, and recreational rivers. Seventeen are listed because of outstanding scenic value. Four are listed because of outstanding recreational value. Ten perennial, four intermittent and four minor streams pass through or along parts of the National Park System.

Hawaii's streams are subject to protection under Article XXII of the State Constitution, the State Water Code, and a comprehensive statewide stream assessment which serves as a basis for protecting stream resources. They are still subject to the Rivers and Harbors Act of 1899.

Only about 1.5 percent of the State's electric energy currently comes from hydroelectric power. The island of Kauai receives 16 percent its electricity from hydroelectric power. On the islands of Hawaii, Kauai, and Maui, there is a total of eighteen operating plants—sixteen run by sugar companies and two managed by a local utility. The combined capacity of the existing plants is only 18.5 megawatts (MW). The new 10 MW Wailuku River Project, which went into operation in 1993, is the only hydropower project built in Hawaii in the past fifty years. None are FERC-licensed projects.

The FERC estimates that there are about 50 MW of unused generating capacity in Hawaii, at twenty-eight potential sites. All of these potential sites would have a capacity of 5 MW or less, with the exception of a potential 11.7 MW site in the Wailua River Basin on Kauai. Nine operating plants are proposed, with a total potential generating capacity of 21 MW.

There are about 28 state permits and 30 to 35 county permits and approvals that are applicable to land and water use proposals. The Department of Land and Natural Resources has the primary responsibility for overseeing many of the regulatory programs involving hydropower development. Proposed hydroelectric projects are subject to a thorough review both when they seek to amend instream flow standards to obtain a State water lease and when they seek to obtain a Conservation District Use Permit.

Section 2408 of the Energy Policy Act of 1992 (Public Law 102-486) directed the Federal Energy Regulation Commission (FERC), in consultation with the State of Hawaii, to study hydroelectric licensing in Hawaii. The purpose of the study is to determine whether such licensing should be transferred to the state. Section 2408 required the FERC to analyze the following:

- (1) the State regulatory programs applicable to hydroelectric power production and the extent to which such programs are

suitable as a substitute for regulation of such projects under the Federal Power Act, taking into consideration all aspects of such regulation, including energy, environmental, and safety considerations;

(2) any unique geographical hydrological, or other characteristics of water ways in Hawaii or any other aspects of hydroelectric power development and natural resource protection in Hawaii that would justify or not justify the permanent transfer of FERC jurisdiction over hydroelectric power projects to that State;

(3) the adequacy of mechanisms and procedures for consideration of fish and wildlife and other environmental values applicable in connection with hydroelectric power development in Hawaii under the state programs referred to in paragraph (1);

(4) any national policy considerations that would justify or not justify the removal of FERC jurisdiction over hydroelectric power projects in Hawaii;

(5) the precedent-setting effect, if any, of provisions of law adopted by the Congress removing FERC jurisdiction over hydroelectric power projects in Hawaii.

On April 13, 1994, the FERC submitted its report to the House Committee on Energy and Commerce and to the Senate Committee on Energy and Natural Resources as required by section 2408. In addition to consulting with the State of Hawaii, the FERC solicited the views of other Federal agencies involved with the regulation of hydropower projects. The report did not reach any overall conclusion as to whether the Federal Power Act should be amended to exempt projects on the fresh waters of Hawaii from FERC's jurisdiction. The FERC stated that the Commission will express no opinion on this issue because it properly falls within the purview of the Congress to decide.

Section 9 amends section 4(e) of the Federal Power Act to exempt projects on the fresh waters of the State of Hawaii from the voluntary licensing authority of the FERC.

Section 9 does not amend section 23(b) of the Federal Power Act which requires the licensing of hydroelectric projects built after 1935 on navigable waters or affecting interstate commerce or are located on federal lands or use water from a government dam.

LEGISLATIVE HISTORY

S. 737 was reported by the Committee on Energy and Natural Resources as an original bill.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTES

The Senate Committee on Energy and Natural Resources, in open business session on March 15, 1995, by a majority vote of a quorum present, recommends that the Senate pass the bill as described herein.

The rollcall vote on reporting the measure was 18 yeas, 0 nays, as follows:

YEAS

NAYS

Mr. Murkowski
 Mr. Hatfield ¹
 Mr. Domenici
 Mr. Nickles ¹
 Mr. Craig
 Mr. Thomas
 Mr. Kyl ¹
 Mr. Grams
 Mr. Jeffords ¹
 Mr. Burns
 Mr. Campbell
 Mr. Johnston
 Mr. Bumpers
 Mr. Ford
 Mr. Bradley
 Mr. Bingaman ¹
 Mr. Akaka
 Mr. Wellstone

¹ Indicates vote by proxy.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of costs of this measure has been provided by the Congressional Budget Office:

U.S. CONGRESS,
 CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 23, 1995.

Hon. FRANK H. MURKOWSKI,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed the Federal Power Act Amendments of 1995, as ordered reported by the Senate Committee on Energy and Natural Resources on March 15, 1995. CBO estimates that enacting the bill would have no net effect of the federal budget.

The bill would provide exemptions or extensions of deadlines for certain hydroelectric projects currently subject to licensing by the Federal Energy Regulatory Commission (FERC). The provisions may have a minor impact on FERC's workload. Because FERC recovers 100 percent of its costs through user fees, any change in its administrative costs would be offset by an equal change in the fees that the commission charges. Hence, the bill's provisions would have no net budgetary impact.

Because FERC's administrative costs are limited in annual appropriations, enactment of the Federal Power Act Amendments of 1995 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill. In addition, CBO estimates that enacting the bill would have no significant impact on the budgets of state and local governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Kim Cawley.

Sincerely,

JUNE E. O'NEILL, *Director*.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out this measure.

The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the provisions of the bill. Therefore, there would be no impact on personal privacy.

Little, if any additional paperwork would result from the enactment of this measure.

EXECUTIVE COMMUNICATIONS

The pertinent communications received by the Committee from the Federal Energy Regulatory Commission setting forth Executive agency relating to this measure are set forth below:

FEDERAL ENERGY REGULATORY COMMISSION,
Washington, DC, March 14, 1995.

Hon. FRANK H. MURKOWSKI,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your letters of February 27 and March 2, 1995, and Committee staff's inquiries of March 13 and 14, requesting my comments on a number of bills to allow for the extension of the construction deadlines applicable to nine hydroelectric projects licensed by the Federal Energy Regulatory Commission. Because it is my understanding that the Committee is scheduled to mark all these bills on March 15, I have combined my comments on these bills in one letter.

This letter also responds to your March 2, 1995 request for comments on S. 225, a bill to remove the Commission's jurisdiction to license projects on fresh waters in the State of Hawaii; and to Committee staff's March 13 request for comments on S. 522, a bill to exempt from Part I the Federal Power Act the primary transmission line for a project in New Mexico. The bills fall into four general categories. Each bill is discussed below.

1. Extension of statutory deadline to commence construction

Section 13 of the Federal Power Act requires that construction of a licensed project be commenced within two years of issuance of the license. Section 13 authorizes the Commission to extend this deadline once, for a maximum additional two years. If project construction has not commenced by this deadline, Section 13 requires the Commission to terminate the license.

As a general principle, I do not support the enactment of bills authorizing or requiring construction extensions for individual projects. However, if such extensions are to be authorized, as a matter of policy I would object to granting a licensee more than ten years from the issuance date of the license to commence construction. In my view, ten years is a more than reasonable period for a licensee to determine definitively whether a project is economically viable and to sign a power purchase agreement. If a licensee cannot meet such a deadline, I believe the site should be made available to potential competitors.

I do not have specific objections to the proposed legislation, except with respect to the ten year maximum time period to begin construction. Suggestions on how to conform the legislation to that principle are noted.

S. 283

S. 283 would authorize the Commission to extend until April 15, 2001, the deadline for commencement of construction of Project Nos. 4474 and 7041. The two projects in question were both licensed on September 27, 1989. In light of my view that ten years is the maximum period that a licensee should be given to commence project construction, I recommend that S. 283 be amended to authorize the Commission to extend the construction deadline until September 26, 1999.

As noted, on September 27, 1989, the Commission issued a license to the Borough of Cheswick, Pennsylvania, and the Allegheny Valley North Council of Governments to construct and operate the 12-megawatt Allegheny Lock and Dam No. 3 Project No. 4474 at an existing Corps of Engineers dam on the Allegheny River, in Allegheny County, Pennsylvania. The Commission issued a license to Potter Township, Pennsylvania, to construct and operate the 20-megawatt Emsworth Hydro Project No. 7041 at an existing Corps of Engineers dam on the Ohio River, in Allegheny County. In 1994, the Commission approved the transfer of the project license to the Potter Township Hydroelectric Authority.

The original deadline for commencement of construction of each project was September 26, 1991. The Commission stayed, pending judicial review, most of the requirements of each license (including the construction deadlines) from September 27, 1990, to April 16, 1992, which resulted in a new construction deadline of April 15, 1993, for each project. This deadline was subsequently extended to April 13, 1995, for each project, because the licensees needed additional time to consult with the Corps regarding site access and project design and construction, and to obtain power sales contracts.

For Project No. 4474, construction entails removing a 135-foot-long section of the existing dam to accommodate a headrace channel, and adding crest gates, a powerhouse, a 142-foot-long side-channel spillway, a one-mile-long transmission line, and related project facilities. For Project No. 7041, construction entails building a 1,800-foot-long dike for the forebay, a 250-foot-long open-channel intake, and a powerhouse.

S. 359

S. 359 would require the Commission to extend until October 3, 1999, the deadline for commencement of construction of Project Nos. 6901 and 6902.

The two projects in question were both licensed to the City of New Martinsville, West Virginia, on September 27, 1989. The Commission issued licenses to construct and operate the 37-megawatt New Cumberland Project No. 6901 at an existing Corps of Engineers dam on the Ohio River, in Hancock County, West Virginia; and the 35-megawatt Willow Island Lock and Dam Project No. 6902 at an existing Corps of Engineers dam on the Ohio River, in Pleasant County, West Virginia, and Washington County, Ohio.

The original deadline for commencement of construction of each project was September 26, 1991. The Commission rescinded the license for Project No. 6901 for lack of issuance or waiver of state water quality certification for the project, and subsequently re-issued the license once state water quality certification was issued. This resulted in a new deadline of October 3, 1993, to commence construction of the project. This deadline was subsequently extended to October 3, 1995, because the licensee needed additional time to secure project financing.

The Commission stayed, pending judicial review, most of the requirements of Project No. 6902 (including the construction deadline) from March 28, 1991, to April 16, 1992, which resulted in a new construction deadline of October 15, 1992. This deadline was subsequently extended to October 15, 1994, to allow the licensee the additional time requested to secure project financing.

For Project No. 6901, construction entails building a 600-foot-long intake channel, a powerhouse, and a 649-foot-long tailrace, and adding a primary transmission line and related facilities. For Project No. 6902, construction entails building a 980-foot-long approach channel, a powerhouse, and an 865-foot-long exist channel, and adding a 1.5-mile-long transmission line and related facilities.

S. 421

S. 421 would authorize the Commission to extend by up to six years the construction deadline for commencement of construction of Project No. 10228.

The Commission issued a license on June 21, 1991, to WV Hydro, Inc. to construct and operate the 80-megawatt Cannelton Hydroelectric Project, to be located at an existing Corps of Engineers dam on the Ohio River, in Hancock County, Kentucky. In 1994, the Commission approved the transfer of the project license to the Cannelton Hydroelectric Project, L.P. The original deadline for the commencement of project construction was June 20, 1993. This deadline was subsequently extended to June 20, 1995, because the licensee had not obtained project financing.

Project construction entails building a 500-foot-long intake channel, a 700-foot-long tailrace channel, and a new powerhouse, and adding a 700-foot-long transmission line, a recreation area, and related facilities.

S. 461

S. 461 would authorize the Commission to extend until May 31, 2001, the deadline for commencement of construction of Project No. 3701.

The Commission issued a license on June 27, 1991, to the Yakima Tieton Irrigation District to construct and operate the 13.6-megawatt Tieton Dam Project No. 3701 at an existing Bureau of Reclamation dam on the Tieton River, in Yakima County, Washington. The original deadline for commencement of project construction was May 31, 1993. This deadline was subsequently extended to May 31, 1995, because the licensee had not obtained a power sales contract.

Project construction entails removing the existing outlet-works valvehouse and adding a new powerhouse, a 21-mile-long overhead transmission line, and related project facilities.

S. 468

S. 468 would authorize the Commission to extend for up to six years the deadline for commencement of construction of Project No. 9423.

The Commission issued a license on April 12, 1991, to Summit Energy Storage, Inc. to construct and operate the 1,500-megawatt Summit Pumped Storage Hydroelectric Project No. 9423, to be located on South Run in Summit and Medina Counties, Ohio. The original deadline for commencement of project construction was April 11, 1993. This deadline was subsequently extended to April 11, 1995, because the licensee had not obtained a power sales contract.

Project construction entails building an upper reservoir, a permanent diversion channel, an underground powerhouse, an underground transformer gallery, six penstocks, a lower reservoir in an existing underground limestone mine, concrete-lined tunnels and shafts to convey flows between the upper reservoir and the lower reservoir, a 3-mile-long transmission line, and related project facilities.

S. 538

S. 538 would require the Commission, at the request of the licensee, to reinstate the terminated license for Project No. 7829 effective May 23, 1993, and give the licensee four years from the date of enactment of S. 538 to commence project construction.

The Commission issued a license on May 25, 1989, to the Talent, Rogue River Valley, and Medford Irrigation Districts to construct and operate the 1,896-kilowatt Emigrant Dam Hydro Project No. 7829 at an existing Bureau of Reclamation dam on Emigrant Creek in Jackson County, Oregon. The original deadline for commencement of project construction was May 24, 1991. This deadline was subsequently extended to May 24, 1993, because the licensee had not obtained a power sales contract. On September 21, 1993, the Commission terminated the license for the licensee's failure to commence construction by the statutory deadline.

Project construction entails adding a bifurcation pipe at the existing outlet pipe of the Emigrant Dam; one penstock, 175 feet long, leading to one powerhouse; a second penstock, 195 feet long,

leading to a second powerhouse; a tailrace, a 1,000-foot-long transmission line, and related project facilities.

2. Extension of deadline to complete construction

Section 13 of the FPA requires a licensee to complete project construction within the deadline established by the Commission. Section 13 provides that “the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the Commission when not incompatible with the public interests.” If the licensee does not complete project construction by the deadline, Section 13 requires the Commission to take steps to terminate the license.

As a general principle, it is not in the public interest to significantly extend the deadline by which a licensee must complete construction of its project and commence hydroelectric operations. However, the Commission is aware that licensed projects to be located at federal dams are subject to the exigencies of operations at the federal facility, and has sought to accommodate this reality as appropriate.

S. 543

S. 543 would require the Commission at the request of the licensee, to extend the time for completion of construction of Project No. 3109 to the later of October 31, 2002, or one year after the date the Corps of Engineers completes construction of a water temperature control structure at the Blue River Dam. The licensee would be required to file with the Commission annual reports of the progress of completion of the Corps’ and the licensee’s construction activities at the dam.

The Commission issued a license on November 16, 1989, to the Eugene Water and Electric Board to construct and operate the 14.65-megawatt Blue River Dam Power Plant Project No. 3109 at an existing Corps of Engineers dam on the Blue River, a tributary of the McKenzie River, in Lane County, Oregon. The original deadlines for commencement and completion of project construction were October 31, 1991, and October 31, 1993, respectively. These deadlines were subsequently extended to October 31, 1993, and October 31, 1995. The licensee commenced project construction on October 28, 1993, in the form of offsite turbine/generator fabrication. Construction work at the site cannot proceed until the Corps completes installation of a water temperature control structure at the dam, an undertaking I understand is currently targeted for completion in 2005.

Project construction entails adding a modified intake structure and outlet tunnel to the Corps dam and installing a 600-foot-long penstock, a powerhouse, a tailrace, a 1.5-mile-long transmission line, a 1-mile-long access road, and related project facilities.

3. Hydropower Projects in Hawaii

S. 225 would amend Section 4(e) of the Federal Power Act by inserting the following parenthetical limitation: “(except fresh waters in the State of Hawaii, unless a license would be required by section 23 of the Act)”. These words would modify the reference to “several States,” so as to partially limit the authority of the Com-

mission to issue licenses under Section 4(e) with respect to proposed hydropower projects in Hawaii.

Section 4(e) of the FPA contains the Commission's authority to issue licenses for hydropower projects. Section 23(b)(1) sets forth the circumstances under which a project cannot be constructed, operated, or maintained without a license. In certain circumstances, the Commission has authority to issue a license for a hydropower project in response to a voluntary application under Section 4(e), even if licensing is not required under Section 23(b)(1). *See Cooley v. Federal Energy Regulatory Commission*, 843 F.2d 1464, 1469 (D.C. Cir. 1988).

Under S. 225, the Commission would continue to have jurisdiction to issue licenses to construct, operate, and maintain hydropower projects in Hawaii whenever Section 23(b)(1) would require a license for such activities. However, the Commission would be precluded from issuing a license for a project in Hawaii if Section 23(b)(1) did not require a license for such activities.

Pursuant to Section 2408 of the Energy Policy Act of 1992, the Commission on April 13, 1994, submitted to the Senate and House Committees a study of regulation of hydropower projects in Hawaii. The study noted that the Commission has never licensed a hydropower project in Hawaii, and is thus not currently regulating any project in Hawaii. Therefore, enactment of S. 225 would not significantly disrupt the Commission's current operations. However, as noted in the study, there are two pending requests for rehearing of Commission decisions concerning proposals to develop a hydroelectric project to be located on the Hanalei River in Kauai County, Hawaii. In *Island Power Co.* (Docket No. EL87-5-001), an intervenor is seeking rehearing of a determination by the Director of the Commission's Office of Hydropower Licensing that the proposed project need not be licensed under Section 23(a)(1) of the FPA because of its effect on diadromous fish and anadromous shrimp. 42 FERC ¶ 62,129 (1988). In *Hanalei Hydropower, Inc.* (Project No. 11161), the State of Hawaii is seeking rehearing of the Director's issuance of a preliminary permit for the project pursuant to licensing authority under Section 4(e) of the FPA because of its location on a Commerce Clause water. 57 FERC ¶ 62,142 (1991).

4. *El Vado Project transmission line*

S. 522 would exempt from regulation under Part I of the Federal Power Act a 12-mile transmission line which is a project work of the licensed El Vado Hydroelectric Project No. 5226.

In 1985, the Commission issued a license to the County of Los Alamos, New Mexico, for the 8-megawatt El Vado Hydroelectric Project, on the Rio Chama, a tributary of the Rio Grande, in Rio Arriba County, New Mexico. The licensed project includes a 12-mile-long 69-kilovolt primary transmission line, which is necessary to the operation of the project. The transmission line is, however, owned and operated by a separate entity, Arriba Electric Cooperative. The license gave Los Alamos five years to acquire the necessary title or contractual operational control over the transmission line. Alternatively, the Cooperative could have join Los Alamos as co-licensee, or could have obtained a separate license for the transmission line. The Cooperative did not wish to pursue either course.

Ten years after the license was issued, the licensee had still failed to comply with the requirement that it obtain necessary property rights over the line, despite repeated letters and compliance orders from the Commission staff.

The transmission line has been constructed and is in operation, and the Commission is not aware of any problems associated with it. The Commission is also not aware of any aspect of this particular primary transmission line that would distinguish it from other hydroelectric project primary transmission lines. Finally, this licensee's years-long lack of compliance with a fundamental license requirement is a troubling factor.

Thank you for offering me an opportunity to comment on bills affecting the Commission's hydropower program. If I can be of further assistance to you in this or any other Commission matter, please let me know.

With best wishes,

Sincerely,

ELIZABETH A. MOLER, *Chair.*

FEDERAL ENERGY REGULATORY COMMISSION,
Washington, DC, March 27, 1995.

Hon. FRANK H. MURKOWSKI,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your letter of March 17, 1995, requesting comments on the Committee Amendment on Alaska hydropower projects of 5 megawatts or less, approved by the Senate Committee on Energy and Natural Resources at its March 15, 1995, business meeting.

THE COMMITTEE AMENDMENT

The Committee Amendment provides (with certain exceptions discussed below) that, at such time as the Governor of the State of Alaska notifies the Secretary of Energy that the State has in place a process for regulating hydropower project works having a power production capacity of 5,000 kilowatts (5 megawatts or MW) or less, according to specified public interest standards, Alaska shall have exclusive authority to authorize all such project works that are not under Commission license or within a license application that has been accepted for filing as of the date of the provision's enactment. If such project works are under a Commission license as of the date of enactment, then the licensee may elect to transfer the project to state regulation.

The Committee Amendment provides that project works are not removed or removable from Commission jurisdiction if they are located in whole or in part on any Indian reservation, unit of the National Park System, component of the Wild and Scenic Rivers System, or segment of a river designated for study for potential addition to such system. State authorizations for project works located in whole or in part on Federal lands shall be subject to the approval of, and terms and conditions imposed by, the Secretary having jurisdiction with respect to such Federal lands. Finally, the transfer to the State of the above-described authority does not pre-

empt the application of Federal environmental, natural, or cultural resources protection laws according to their terms.

FERC-REGULATED HYDROPOWER PROJECTS IN ALASKA

The Commission authorizes the construction, operation, and maintenance of hydropower projects under three different instruments: licenses issued pursuant to Part I of the Federal Power Act; exemptions from licensing, issued pursuant to Section 30 of the FPA for hydropower projects of up to 40 MW located on certain types of conduits and on non-federal land (conduit exemptions); and exemptions from licensing, issued pursuant to Section 405 of the Public Utility Regulatory Policies Act of 1978 for certain projects with 5 MW capacity or less located at non-federal pre-1977 dams (5 MW exemptions). In addition, under Section 4(f) of the FPA the Commission issues preliminary permits under which permittees may study the feasibility of a project proposal while holding the right of priority to apply for a license or exemption.

There are currently 20 licensed projects in Alaska. Of these, 15 projects occupy National Forest lands administered by the U.S. Forest Service, and five projects occupy federal lands administered by the U.S. Bureau of Land Management (BLM). Of the total of 20 licensed projects, 11 projects are 5 MW or less, and 9 projects are larger than 5 MW.

There are 3 exempted projects in Alaska, all under 5 MW. One project occupies National Forest lands, and two occupy non-federal lands.

Accordingly to the Commission's computer data base, it appears that none of the licensed or exempted projects occupies an Indian reservation. One project occupies a National Moose Range; one project is at least partly within the Skagway-White Pass National Historic Landmark; one project occupies a segment of the Deer Mountain-John Mountain Trail, which is part of the National Recreation Trail System; and one project occupies the Kodiak National Wildlife Refuge. Effective with the passage of the Energy Policy Act of 1992, there are new criteria governing the Commission's power to authorize projects that would occupy a unit of the National Park System.

The data base does not indicate that there are any existing projects located on rivers that are now included, or being studied for inclusion, in the national Wild and Scenic Rivers System. We note that under Section 7(a) of the Wild and Scenic Rivers Act the Commission is barred from licensing (or exempting from licensing) the construction of hydropower project works on or directly affecting any river included, or being studied for inclusion, in the System.

There is currently pending before the Commission one Alaska license application, which has been accepted for filing. The application is for a 4 MW project to be located on National Forest lands. Also pending is an accepted Alaska exemption application for a 7 00 kW project on non-federal land.

Finally, there are a number of potential Alaska projects at the pre-development application stage. Eight project proposals are currently being studied under issued preliminary permits. Of these, two would be projects over 5 MW, both to occupy National Forest

lands. Six would be projects 5 MW or less, of which three would occupy National Forest lands, one would occupy BLM lands, and two would occupy non-federal lands. There are also pending two Alaska permit applications, one to study a 2.5 MW project on National Forest lands, and one to study a 8 MW project on non-federal lands.

COMMENTS ON THE COMMITTEE AMENDMENT

As a general matter, I do not support legislation removing non-federal hydropower projects from the Commission's jurisdiction based on the size of the project. A project with a small capacity can have a *very* significant impact both at the project site and far beyond its immediate environs. That impact must be evaluated. Pursuant to the mandates of the Federal Power Act, the Commission performs that evaluation and in doing so gives equal consideration to development interests and environmental resources in determining whether, and with what requirements, to authorize hydropower development.

The underlying premise of the legislation is that Alaska presents the Congress with a special case that favors local control over projects that otherwise be subject to the Commission's jurisdiction. Inasmuch as Alaska is not interconnected with the interstate, electric grid in the Lower 48 states, I am willing to consider Alaska's special circumstance and will not object to the legislation provided that a proper state program is in place to ensure that the impact of any 5 MW project is evaluated. However, I would oppose a generic 5 MW exemption for projects located in the Lower 48 states. Such piecemealing will have a deleterious effect on the Commission's ability to study and mitigate the cumulative environmental effects of all non-federal hydropower projects in a river basin or watershed.

There are a number of technical issues associated with the Committee Amendment. I will address these next.

The Amendment requires the Governor of the State of Alaska to notify the Secretary of Energy that the State has a regulatory program in place. Under the Department of Energy Organization Act, the Secretary is not charged with responsibility for administering the hydropower development program. Rather that responsibility resides with this Commission. I would respectfully suggest that the notification be addressed to the Chair of the Commission rather than the Secretary. We would, in turn, notify the Secretary of the Interior, the Secretary of Commerce, and the Secretary of Agriculture as required according to the jurisdiction of Federal lands affected.

The Amendment provides for the transfer to the State of Alaska of the Commission's jurisdiction over specified hydropower "project works." Section 3(12) of the Federal Power Act defines "project works" as "the physical structures of a project." Section 3(11) of the FPA defines "project" as a:

complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, divert-

ing, or forebay reservoirs directly connected therewith, the primary transmission line or lines transmitting power therefrom to the point of junction with the distribution system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit.

Since “project works” do not include water rights, rights-of-way, or lands and interests in lands, then with respect to project works removed from Commission jurisdiction the project developer would have to obtain such rights and interests from the appropriate state or federal entity. With respect to non-federal lands needed for a project, the developer would not have access to the federal right of eminent domain provided to licensees by Section 21 of the FPA.

With respect to future hydropower proposals in Alaska, the Amendment provides to standard for defining “project works having a power production capability of 5,000 kilowatts or less.” Absent statutory criteria to the contrary, there is the potential for abuse in “packaging” proposed project works in a manner that artificially segregates into 5 MW grouping the power production components of what is in fact a single unit of development, in order to evade Commission jurisdiction. Or a developer may deliberately underutilize the water power potential of a stream in order to evade Commission jurisdiction. Creating these incentives would not in my view foster public interest objectives.

The Amendment does not address the Commission’s exemption authority. As I described above, the Commission has two sources of statutory authority to issue exemptions from licensing for qualifying projects. An exemption is not tantamount to federal deregulation; rather, it is a form of lesser regulation designed for projects which by their nature will not ordinarily entail a significant impact on the environment. Exempted projects are subject to mandatory fish and wildlife conditions imposed by state and federal fish and wildlife agencies. Inasmuch as the Amendment does not mention exemptions, projects exempted as of the date of the Amendment’s enactment would not be subject to transfer to State regulation.

Any future development proposal of 5 MW or less, whether or not it would have qualified for an exemption, would however appear to come under State, not Commission, jurisdiction. This would appear to be the intent, even though the Amendment states that, as to qualifying project works, “the State of Alaska shall have the exclusive authority to authorize such project works under State law, in lieu of licensing by the Commission under otherwise applicable provisions of this part [Part I of the FPA].” Assuming I am correctly understanding the intent, the Amendment should provide for the State’s exclusive authority, “in lieu of licensing and exemption from licensing by the Commission under otherwise applicable provisions of this part and of Section 405 of the Public Utility Regulatory Policies Act of 1976.”

As noted, the State’s “exclusive” authority under qualifying project works is in lieu of the Commission’s authority. However, the Amendment provides that no transfer of authority to the State

“shall preempt the application of Federal environment, natural, or cultural resources protection laws according to their terms.” In addition, with the removal of the Commission’s authority, other Federal agencies may have jurisdiction over certain projects. For example, removal of the Commission’s jurisdiction leaves intact the jurisdiction of the U.S. Army Corps of Engineers under the Rivers and Harbors Act of 1899, which requires a Corps permit for new construction in navigable waters. Presumably, any Corps action under the 1899 Act would be a Federal action subject to applicable Federal procedural and resource protection laws, such as the National Environmental Protection Act, the Clean Water Act, Historic Preservation Act, the Endangered Species Act, and so forth.

There is a final technical point. The Amendment provides for the transfer to the State of Alaska of qualifying projects for which no license application has been accepted by the Commission as of the date of enactment of the Amendment. It also provides that project developers can choose to transfer to State regulation projects that were under Commission license as of the enactment date. However, the Amendment makes no provision for projects not under license but for which a license application was submitted to the Commission but not yet accepted for filing as of the enactment date.

Thank you for the opportunity to comment on this legislative proposal, which is of considerable significance to the Commission’s hydropower program.

With best wishes,
Sincerely,

ELIZABETH A. MOLER, *Chair*.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill S. 225, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

FEDERAL POWER ACT

THE ACT OF JUNE 10, 1920, CHAPTER 285

SEC. 4. * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation, organized under the laws of the United States, or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which congress has jurisdiction under its authority to regulate commerce with foreign nations and along the [several States, or upon] *several States (except fresh waters in the State of Hawaii, unless a license would be required by section 23 of the Act), or upon any part*

of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: Provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation. Provided further, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: Provided further, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920. And provided further, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

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